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ELEMENTS OF AN INTERNATIONAL AGREEMENT ON THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS ON THE HIGH SEAS

(Working paper submitted by the delegations of Chile, Colombia, Ecuador and Peru)

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BACKGROUND

This document is intended to be a contribution to the consideration of all the issues raised in the text prepared by the Chairman of the Conference (A/CONF.164/10). It therefore follows the order of the issues proposed by the Bureau as a model for the organization of our work.

The delegations of Peru and Colombia have already submitted lists of issues in documents A/CONF.164/L.1 of 27 May 1993 and A/CONF.164/L.4 of 2 June 1993, respectively. In the light of the guide to the issues before the Conference prepared by the Bureau, it was considered useful to consolidate the previous submissions into a more organic and systematic text.

Chile, Colombia, Ecuador and Peru, the four countries submitting this document, have benefited from the experience gained in the preparation of a draft regional agreement on the fishing of straddling and highly migratory species in areas of the high seas of the South-East Pacific.

The draft agreement is the culmination of the efforts of the countries members of the Permanent Commission for the South Pacific (PCSP) to protect fish stocks within and beyond their respective jurisdictional zones. Since the beginning of the 1980s, successive ministerial declarations by PCSP member countries have expressed concern at the absence of measures to regulate fishing on the high seas adjacent to the 200-nautical-mile zone. In 1985, the PCSP General Secretariat prepared a draft agreement, but consideration of the text was postponed to allow for continuation of the technical studies which would lay the foundations for agreement.

The new agreement has been proposed by the Peruvian National Division within PCSP. The PCSP Conference of Ministers for Foreign Affairs, held at Lima at the beginning of 1993, approved the initiative. The Ministers of Chile, Colombia, Ecuador and Peru instructed the PCSP General Secretariat to consult with their Ministries of Foreign Affairs before beginning formal consideration of the draft agreement at the Annual Meeting of PCSP Contracting Parties, which will be held at Santiago in August.

The preliminary draft of the agreement consists of a preamble containing the rationale for the agreement, which was prepared "in conformity with, and in addition to, the provisions of the United Nations Convention on the Law of the Sea" with a view to contributing to the progressive development of the relevant international rules.

The body of the agreement consists of 27 articles dealing with definitions, objectives, scope of application, regulated species, general obligations, the role of PCSP, subsidiary organs, collection of data, conservation measures, monitoring and control systems, procedure for formulating and adopting measures, sanctions, register of fishing vessels, register of fishing activities, sub-areas of the agreement, non-parties, financial contributions, settlement of disputes, protection of legal positions, and the standard final clauses.

The purpose of the agreement is to define criteria that can be used to regulate the fishing of straddling and highly migratory species in areas of the

high seas adjacent to the zones under national jurisdiction in the South-East Pacific, in conformity with, and in addition to, internationally accepted norms; coordinate measures for the conservation and sound management of such species; promote research and the collection of the relevant scientific, technological and statistical data; coordinate the implementation of effective monitoring, control and enforcement procedures; and guarantee recourse to compulsory dispute settlement procedures.

The area in which the draft agreement will be applicable is based on the world distribution of fishing zones for statistical purposes of the Food and Agriculture Organization of the United Nations (FAO) and corresponds to area 87 for which PCSP is responsible, excluding the areas under national jurisdiction both in the continental and insular waters of the four countries members of the Commission. This area is described in annex I of the agreement.

Annex II contains a list of the straddling and highly migratory species covered by the agreement. This annex may be amended in the light of subsequent scientific research.

It would be useful to establish an interim secretariat, which would continued to operate until a regional organization was set up to regulate fishing on the high seas in the South Pacific. This function would be assumed by the PCSP General Secretariat, which the member States consider to be the appropriate maritime organization under the terms of the United Nations Convention on the Law of the Sea. As is well known, since its establishment concomitantly with the proclamation of the 200-mile jurisdiction, PCSP has carried out a great deal of specialized work in the conservation of the living resources of the seas, protection of the marine environment, scientific research and the promotion of international maritime law.

The agreement to which the States members of PCSP would become parties would be open to all States whose fishing fleets operate in areas of the high seas adjacent to the jurisdictional zones of the aforesaid States members.

The provisions dealing with the collection of data merit particular attention, since they emphasize the scientific, technological and statistical aspects of the required data in terms compatible with the forward-looking and cautious approach; the adoption of conservation measures applicable to the high seas and which should be consistent with, and in no case less stringent than, the measures applicable to the respective exclusive economic zones of the member States; monitoring and control systems that would be part of the work carried out by FAO; a consensus procedure for formulating and adopting conservation measures; penalties regime, under which penalties would be commensurate with the nature of the offence and the illegal economic profits derived therefrom; mechanisms for registering fishing vessels and fishing activities similar to those already established by the countries of the South Pacific Forum; and the compulsory recourse to dispute settlement mechanisms.

In the light of the experience gained from the draft agreement that has just been described, Chile, Colombia, Ecuador and Peru consider that an agreement on an international regime to regulate and ensure the conservation and proper management of high seas fisheries can be established advantageously only through a binding instrument.

Such a treaty, convention or protocol should reaffirm the validity of the United Nations Convention on the Law of the Sea and contribute to the application of the principles contained in the Declaration of Cancún on responsible fishing, the Tlatelolco Platform on Environment and Development and chapter 17 of Agenda 21.

I. AIMS OF THE INTERNATIONAL REGIME

The objectives of the international regime shall be as follows:

1. To define the criteria applicable to the regulation of fishing of straddling and highly migratory species in areas of the high seas adjacent to the zones of national jurisdiction of the States parties.

2. To coordinate among the contracting parties measures for the conservation and sound management of such species.

3. To promote the investigation and collection of relevant, scientific, technical and statistical data.

4. To adopt effective monitoring, control and enforcement procedures.

5. To ensure recourse to compulsory dispute settlement procedures.

II. CONSERVATION AND MANAGEMENT MEASURES

Any measures to be established for the conservation and sound management of regulated species shall be designed to ensure the optimum sustainable yield, as qualified by relevant environmental and economic factors.

As far as possible, these measures shall include:

1. Establishment of the maximum catch allowable per species, geographical area, season or fishing vessel.

2. Setting of minimum sizes for stocks of harvested species and a minimum permissible mesh size.

3. Prohibition of specific fishing gear and equipment, and also of practices which pollute the marine environment.

4. Use of effective procedures to reduce incidental catches of other accompanying species that are useful or protected to a minimum.

5. Establishment of conservative quotas for species which have not been the object of proper assessment.

6. Declaration that fisheries are saturated or establishment of closed seasons when there are signs which suggest that exploitation of specific species is nearing levels at which the population may become seriously threatened.

III. COOPERATION MECHANISMS IN THE REGIONAL FRAMEWORK

The United Nations Convention on the Law of the Sea establishes the general obligation of all States to cooperate in the conservation and management of the living resources of the high seas. This obligation is the basis for the entire system of the Convention and is part of customary international law.

The United Nations Convention on the Law of the Sea clearly foresaw that the most appropriate way of resolving the problems of conservation and management would be to establish this obligation to cooperate. Article 117 refers to the duty [of States] to take, or to cooperate with other States in taking, measures for their respective nationals. Article 118 reiterates this and also adds the obligation to enter into negotiations when nationals of several States exploit identical living resources, or different resources in the same area, and that of establishing subregional or regional fisheries organizations.

While the Convention does not spell out the content of such cooperation nor specify the institutional mechanisms whereby it is to be effected, there are precedents which facilitate the joint elaboration of conservation and management measures. With regard to bilateral relations between States, it is necessary to institutionalize a consultative mechanism between the coastal State and the distant-water fishing State. With regard to multilateral relations between several States, the mechanism should be developed and applied by the regional organization.

The fundamental questions are: What procedure should be applied to the adoption of the measures? What happens if no agreement is reached? Is there an obligation to accept "reasonable proposals"?

It is suggested that the following procedure be established for such purposes:

1. Proposals concerning measures for the conservation and sound management of the regulated species in the area covered by the agreement shall be drawn up on the basis of the best scientific evidence available within six months of the signing of a regional agreement by member States. In addition, proposals will be introduced with regard to the system for monitoring, controlling and enforcing applicable measures in the area covered by the agreement, and the regime of penalties for those who violate such measures.

2. Any proposals which the signatory and acceding States adopt by consensus shall become binding on them all, as from the date on which they become contracting parties.

3. If consensus cannot be reached on one or more of the proposals, the Secretariat of the regional organization shall, within a period of 30 days, deliver to the signatory and acceding States a revised text of such proposals, taking the observations formulated into account.

4. The signatory and acceding States shall have 30 days in which to submit their comments to the Secretariat of the regional organization; the latter shall

circulate a second version of the proposals to all signatory and adhering States, requesting their comments.

5. Thirty days after receipt of the last comment the Secretariat of the regional organization shall convene a meeting of signatory and acceding States in order to submit to them the final version of the proposals in question.

6. In the absence of consensus on one or more of these latter proposals, once the regional agreement enters into effect, any conservation measures that States members may have adopted within their jurisdictional zones, with respect to the regulated species, shall be respected by all States whose nationals fish such species within the area covered by the agreement.

IV. PARAMETERS GOVERNING THE CONSERVATION AND MANAGEMENT OF RESOURCES BY REGIONAL ORGANIZATIONS

1. The fish stock or stocks to which the regional agreement applies

(a) The agreement should apply to all species found in the area covered by the regional agreement which, according to available scientific evidence, are considered to be common or straddling stocks by virtue of their customary movements or range of distribution during their life cycle. It also should apply to all species found in the area covered by the regional agreement which, according to available scientific evidence, are considered "highly migratory" by virtue of their customary movements or range of distribution during their life cycle;

(b) An appropriate method would be to identify the species covered by the regional agreement in one or more annexes, which can be modified as new scientific knowledge comes to light.

2. Geographic area

(a) One approach would be to use the definition of areas, subdivided in turn into scientific and statistical sub-areas, employed by FAO, but excluding the portions of those areas under national jurisdiction;

(b) Another option would be to use as a basis the regional features which affect or characterize the ecology of the international zone adjacent to one or more coastal States.

3. Members of the agreement

Coastal States and States engaged in fishing activities in the zone covered by the agreement which agree to become contracting parties constitute members of the agreement.

4. Duty to participate in regional fisheries organizations or arrangements

This should be stipulated in the agreement.

5. Internal structures

These structures will reflect the circumstances in the region concerned.

6. Financing

Although the contributions arrangement will vary with regional capacity, one possible formula would be to allocate a percentage of the value of annual catches of regulated species by flag-State fishing vessels in the area covered by the regional agreement.

7. Relationship with regional organizations

Existing small regional organizations might, on either a temporary or permanent basis, serve as the technical secretariat or coordinating body with respect to the activities prescribed in the regional agreement.

8. Non-parties

The contracting parties shall draw the attention of any State not a party to the regional agreement to any matter pertaining to fishing activities by nationals or vessels of that State in the area covered by the agreement that might adversely affect the fulfilment of its objectives. In addition, the contracting parties should agree on what action should be taken where necessary to prevent such adverse occurrences.

9. New entrants

The logical counterpart to the duty of States which have established a joint regime for the administration of an area of the high seas not to discriminate against other States wishing to gain access to the fishery is the obligation of the new entrant to cooperate in good faith and comply with existing management measures.

10. Developing countries

The specific requirements of the developing countries should be taken into account within the framework of the international high seas regime; in particular, they should be provided with technical assistance and financial support to enable them to participate in high seas fishing.

V. FUNCTIONS OF REGIONAL FISHERIES ORGANIZATIONS OR ARRANGEMENTS

1. To promote the adoption by the contracting parties of appropriate measures for the conservation and sound management of regulated species in the area covered by the agreement, in order to maintain or restore populations of those species at levels which can produce the optimum sustainable yield, as qualified by relevant environmental, ecological and economic factors, and taking into account the best scientific evidence available.

2. To ensure that States members harmonize the conservation measures applicable within their respective jurisdictional zones in order to facilitate compliance with such measures by all States in adjacent areas where no agreement to that end exists between the contracting parties.

3. To determine, on the basis of the best scientific evidence available, whether one or more regulated species is being harvested in the area covered by the regional agreement above levels at which their reproduction may become seriously threatened; and, in such cases, to adopt any protective measures deemed necessary, including declaring fisheries saturated and establishing closed seasons.

4. To request from the contracting parties and competent international organizations any scientific data they may have regarding the distribution, abundance, biology, biometrics, ecology, fishery and population dynamics of regulated species, as well as regarding the impact of the exploitation thereof on the environment and on the respective ecosystems of the area covered by the regional agreement and areas under the jurisdiction of member States.

5. In addition, to request from the contracting parties and competent international organizations data on vessels operating in the area covered by the regional agreement, catch and fishing effort statistics and other data relevant to the conservation and sound management of regulated species.

6. To those ends, to maintain a register of fishing vessels authorized by their respective States to operate in the area covered by the regional agreement and a register of the fishing activities of such vessels carried out pursuant to the agreement.

7. To the extent possible, to promote, coordinate, conduct, assess, publish and disseminate scientific, technical and statistical studies, research and data on the fishing of regulated species within the area covered by the agreement and in areas under the jurisdiction of member States, and to exchange information with national and international entities having similar objectives.

8. To provide a forum for consultation and cooperation among the contracting parties on the study, assessment and exchange of information regarding regulated species and the environmental and ecological factors involved.

9. Using the data at its disposal, to consult with and answer queries from the contracting parties on any matter referred to in this article.

10. Together with the contracting parties, to coordinate the implementation, in the area covered by the agreement, of systems for the monitoring, control and enforcement of agreed measures to ensure the conservation and sound management of regulated species, including the imposition of penalties on violators.

11. To seek from the contracting parties or competent international organizations the economic and technical assistance which they are in a position to provide, in order to facilitate the attainment of the objectives envisaged in the regional agreement.

VI. COLLECTION AND PROVISION OF INFORMATION

1. The secretariat of the regional organization, initially with the cooperation of the signatory States and, when the time comes, with that of all the contracting parties and of the competent international organizations, shall endeavour to assemble:

(a) The best scientific evidence, particularly on the delimitation of the range of distribution of regulated species in the area covered by the regional agreement; the structure, migration and interaction of the stocks of these species, their concentrations and reproduction rates and other relevant data concerning their life cycles; the functioning of ecosystems and of bio-economic interactions between fisheries; and other information providing a better knowledge of the vital ocean habitats and spawning and reproduction zones of the main species, and of the characteristic oceanographic conditions in which they live;

(b) All available technical information concerning fishing vessels that are authorized to exploit regulated species in the area covered by the regional agreement, including their capacity, power, fishing gear and equipment used, range and location of their operations, patterns and seasonal and special movements of fleets; and also information on the most appropriate systems for monitoring fishing grounds through transmitters connected by satellite and access to land-based data banks; information on the characteristics of fishing vessels and the most appropriate fishing gear and equipment for fishing regulated species in the area covered by the agreement, on the use of appropriate technological methods to allow coastal developing States to participate effectively in the conservation and sound management of such species in areas adjacent to the areas under their national jurisdiction, and on the possibility that, for those purposes, coastal developing States will benefit from programmes of technical assistance, training and transfer of technology;

(c) All available statistical data concerning the fishing of regulated species in the area covered by the regional agreement, including basic data on catches and fishing effort according to type of fishing gear and method; incidental catches of other useful species and discards by area and type of fishing gear; transshipment operations, unloading and marketing; and also the establishment of regional data base systems available to all the contracting parties.

2. For the purposes referred to in paragraph 1, subparagraph (a), the secretariat of the regional body shall request the cooperation of the States

concerned and of the competent international organizations in carrying out international programmes of research on regulated species in the area covered by the regional agreement, including, where possible, conducting joint scientific research or correlating the operations and results of research carried out separately.

VII. COMPLIANCE WITH THE MEASURES

1. Monitoring, control and enforcement systems

The monitoring, control and enforcement systems that are adopted under the regional agreement must make it possible to verify compliance with the agreed conservation and management measures, and for that purpose shall provide for:

(a) The use of satellite data-transmission systems to report positions, catches and fishing effort;

(b) The use of other aerial monitoring systems and cooperative observation and control methods, including the presence of on-board observers and the granting to one another of authority to make inspections and verifications at the time of unloading and in the processing areas;

(c) The provision of the relevant technical and statistical information;

(d) The inclusion, in the internal legislation of the contracting parties, of provisions prohibiting vessels that fly their flag from fishing these regulated species in the area covered by the agreement in violation of the agreed conservation measures; and

(e) The establishment of effective enforcement systems, whether arrests and prosecutions are carried out by the flag State, whether joint enforcement procedures are agreed upon with the coastal State, or there is reciprocal authorization for arrests or prosecutions by any contracting party, and especially by the coastal State in cases of violations which directly affect their interests.

2. Penalties

(a) The system of penalties established in cases of violations of the measures adopted under the regional agreement must take into account the principle that the penalty must be commensurate with the nature of the offence and with the illegal economic profits derived therefrom, and shall include the procedure to be followed in imposing such penalties, and notifying the secretariat of the competent regional body of the action taken by the States concerned;

(b) The secretariat of the competent regional body shall encourage member States to harmonize the system of penalties applicable, within their jurisdictional zones to the fishing of species regulated under the agreement, bearing in mind that, if no consensus is reached on the proposed penalties or if

the proposed time limits have expired, all States will have to comply with the system;

(c) In that event, if the States whose nationals fish regulated species in the area covered by the regional agreement fail to comply with the measures established by the member States, the latter shall take such additional steps as they may deem appropriate, at both the domestic and international level, to ensure the protection of their rights and interests.

VIII. OTHER ASPECTS OF THE ENFORCEMENT OF CONSERVATION AND MANAGEMENT MEASURES

1. Register of fishing vessels

The Secretariat of the regional organization shall maintain a register of all fishing vessels authorized by the States of their flag to exploit regulated species in the area covered by the regional agreement. For this purpose, the respective States shall communicate to the Secretariat of the regional organization the characteristics of such vessels, as well as the names, nationalities and addresses of the shipowner and of the captain or employer.

2. Register of fishing activities

(a) The Secretariat of the regional organization shall also maintain a regional register of fishing activities in which it shall enter the information provided each quarter by the contracting parties on fishing of regulated species by vessels flying their flag in the area covered by the regional agreement; it shall include data on the species harvested, place, date and volume of catch, incidental catch and other related data;

(b) These data shall be collated, as far as possible, with the data obtained by the Secretariat of the regional organization through the satellite data-transmission system and other monitoring and control arrangements.

3. Flags of convenience

States which permit the use of flags of convenience shall take all necessary measures to ensure that this practice is not employed with the aim of evading compliance with the measures for the conservation and sound management of regulated species in the area covered by the regional agreement. For this purpose, they shall authorize other States to exercise controls, and to impose and enforce the necessary penalties.

IX. SETTLEMENT OF DISPUTES

1. The ideal rule is set out in Part XV, Section 2, of the United Nations Convention on the Law of the Sea, which requires that disputes arising from a conflict of interest in relation to high seas fisheries resources be submitted to a court or tribunal for compulsory dispute settlement. However, there is no binding obligation under international law to resort to dispute settlement mechanisms involving third parties, thus the provisions of the United Nations Convention on the Law of the Sea cannot be considered to be applicable until that convention enters into force.

2. However, even before such entry into force, States may agree to submit to dispute settlement procedures within the framework of regional or subregional organizations.

3. On this basis, where a dispute arising from the interpretation or implementation of the regional agreement and of measures adopted in relation thereto is not settled by some other peaceful means selected by the contracting parties, it shall be submitted, at the request of any of the parties to the dispute, to the competent court or tribunal established by the parties. The decisions of such court or tribunal shall be final and shall be binding on all parties.

4. Given the technical nature of many of the possible disputes, formulas which have been proposed for some transboundary disputes relating to the environment may be applied, such as recourse to national courts to which both parties have conferred authority; technical panels; and environmental hearings combined with periodic reports from Governments, which may be discussed in a regional or international forum, such as the Commission on Sustainable Development. Lastly, procedures for the conciliation of disputes between the parties should be formalized.

X. COMPATIBILITY AND COHERENCE BETWEEN NATIONAL AND INTERNATIONAL MEASURES FOR THE CONSERVATION AND MANAGEMENT OF THE LIVING RESOURCES OF THE HIGH SEAS

In order to achieve these objectives, the following measures must be taken:

1. Implementation of the provisions of article 116 of the United Nations Convention on the Law of the Sea regarding the right of nationals to engage in fishing on the high seas "subject to the rights and duties as well as the interests of coastal States". This may be done through:

(a) A mechanism for consultations on the adoption of any measure that may affect straddling fish stocks in the high seas adjacent to the exclusive economic zone of that State or highly migratory fish stocks in the "region" delimited for their conservation and management;

(b) A mechanism to assess the environmental impact of regional fishing activities both in the exclusive economic zone of the coastal State and in the area of the high seas to which the conservation and management measures apply;

(c) A periodic review of the degree of effectiveness and compliance with the agreed standards.

2. Considering the unity of the ecosystem as a principle of conservation and management, taking due account of the relationship between species and their habitats.

3. Ensuring that the standards established in respect of an area of the high seas are no less stringent than those applicable to the exclusive economic zone or zones adjacent to that part of the high seas.

4. Where agreement is reached on a standard that is more stringent than that which is applied in the exclusive economic zone of the coastal State, such State shall undertake to voluntarily apply the agreed standard in its exclusive economic zone.

5. Where no consensus is reached on a "reasonable" proposal for a minimum standard, following the procedure for the adoption of conservation and management measures, the standards in force in the exclusive economic zone of the coastal State shall be applied.